

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF OHIO
9 EASTERN DIVISION

10 Jaclyn Davis,

11 Plaintiff,

No. _____

12 vs.

13 The Samurai, Inc. d/b/a Benihana,

14 Defendant.

COMPLAINT

(Demand for Jury Trial)

15
16 COMES NOW Plaintiff, Jaclyn Davis (“Plaintiff”), individually, by and through the
17 undersigned attorney and sues the Defendant, The Samurai, Inc. d/b/a Benihana and she
18 alleges as follows:

19
20 **PRELIMINARY STATEMENT**

21 1. This is an action for unpaid wages, liquidated damages, attorneys’ fees, costs,
22 and interest under the Fair Labor Standards Act (“FLSA”), as amended, 29 U.S.C. § 216(b).

23 2. The FLSA was enacted “to protect all covered workers from substandard
24 wages and oppressive working hours.” Barrentine v. Ark Best Freight Sys. Inc., 450 U.S. 728,
25 739 (1981). Under the FLSA, employers must pay all non-exempt employees a minimum
26
27

wage of pay for all time spent working during their regular 40 hour workweeks. See 29 U.S.C. § 206(a). The FLSA's definition of the term "wage," in turn, recognizes that under certain circumstances, an employer of tipped employees may credit a portion of its employees' tips against its minimum wage obligation, a practice commonly referred to as taking a "tip credit." See id. § 203(m). The FLSA further recognizes that, under certain circumstances, an employee may be engaged in "dual jobs," during which an employer may only impose a tip credit on an employee's wages for time spent working while engaged in a tip-producing occupation. See 29 U.S.C. § 203(m). See also 29 C.F.R. § 531.56(e), Department of Labor Field Operations Handbook § 30d00(e).

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 201, *et seq.* This civil action arises under the Constitution and law of the United States.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(ii) because acts giving rise to the claims of Plaintiff occurred within the Northern District of Ohio, and Defendant regularly conducts business in and have engaged in the wrongful conduct alleged herein – and, thus, are subject to personal jurisdiction in – this judicial district.

PARTIES

5. At all material times, Plaintiff is an individual residing in Cuyahoga County, Ohio, and is a former employee of Defendant.

1 6. At all material times, Defendant was a corporation duly licensed to transact
2 business in the State of Ohio. Defendant does business, has offices, and/or maintains agents
3 for the transaction of its customary business in Cuyahoga County, Ohio.

4 7. At all relevant times, Plaintiff was an employee of Defendant. At all relevant
5 times, Defendant, acting through its agents, representatives, employees, managers, members,
6 and/or other representatives had the authority to hire and fire employees, supervised and
7 controlled work schedules or the conditions of employment, determined the rate and
8 method of payment, and maintained employment records in connection with Plaintiff's
9 employment with Defendant. In any event, at all relevant times, Defendant was an employer
10 subject to the Fair Labor Standards Act (FLSA) and employed Plaintiff.

11 8. At all relevant times, Plaintiff was an "employee" of Defendant as defined by
12 the FLSA, 29 U.S.C. § 201, *et seq.*

13 9. The provisions set forth in the FLSA, 29 U.S.C. § 201, *et seq.*, apply to
14 Defendant.

15 10. At all relevant times, Defendant was and continues to be an "employer" as
16 defined by FLSA, 29 U.S.C. § 201, *et seq.*

17 11. Defendant individually and/or through an enterprise or agent, directed and
18 exercised control over Plaintiff's work and wages at all relevant times.

19 12. Plaintiff, in her work for Defendant, was employed by an enterprise engaged
20 in commerce that had annual gross sales of at least \$500,000.

NATURE OF THE CLAIM

1 13. Defendant owns and/or operates as The Samurai, Inc. d/b/a Benihana, an
2 enterprise located in Cuyahoga County, Ohio.

3 14. Plaintiff was hired by Defendant as a tipped employee as defined by the
4 FLSA, 29 U.S.C. § 201, *et seq.*, to work as a server, and Plaintiff worked for Defendant
5 between approximately April 1, 2013 and May 31, 2014, when Plaintiff left her employment
6 with Defendant.

7 15. Rather than pay its tipped employees the applicable minimum wage, for the
8 time Plaintiff was paid as a tipped employee, Defendant imposed a tip credit upon Plaintiff
9 at below the applicable minimum wage.

10 16. As a result of Defendant's imposition of a tip credit, Plaintiff was forced to
11 perform work at an hourly rate that was less than the applicable minimum wage.

12 17. Defendant engaged in the regular practice of requiring Plaintiff to perform a
13 substantial amount of non-tipped labor related to her tipped occupation in excess of 20% of
14 her regular workweek and non-tipped labor unrelated to her tipped occupation over the
15 course of her regular workweeks.

16 18. Examples of non-tipped labor related to Plaintiff's tipped occupation that
17 exceeded 20% of Plaintiff's regular workweek, include, but are not limited to: preparatory
18 and workplace maintenance tasks such as brewing tea, brewing coffee, rolling silverware,
19 cleaning soft drink dispensers, wiping down tables, setting tables, busing tables, cutting and
20 stocking fruit, stocking ice, taking out trash, scrubbing walls, sweeping floors, restocking to-

1 go supplies, cleaning booths, cleaning ramekins, sweeping, mopping, restocking all stations,
2 washing dishes, and breaking down and cleaning the expo line.

3 19. Examples of non-tipped labor unrelated to Plaintiff's tipped occupation that
4 Plaintiff performed during her regular workweeks, include, but are not limited to:
5 preparatory and workplace maintenance tasks such as taking out trash, scrubbing walls,
6 sweeping floors, cleaning booths, sweeping, mopping, washing dishes, breaking down and
7 cleaning the expo line, restocking restrooms, and cleaning toilets, urinals, and restroom
8 floors.
9

10 20. As a result of Defendant's willful requirement that Plaintiff perform a
11 substantial amount of non-tipped labor related to her tipped occupation in excess of 20% of
12 her regular workweeks and non-tipped labor unrelated to her tipped occupation over the
13 course of her regular workweeks, Defendant paid Plaintiff less than the overall minimum
14 wage for such work that Plaintiff performed for Defendant, such that the average of
15 Plaintiff's hourly wages was less than the applicable minimum wage.
16

17 21. In both policy and practice, Defendant regularly and consistently required
18 Plaintiff to perform the above-listed non-tipped labor related to her tipped occupation in
19 excess of twenty percent (20%) of Plaintiff's regular workweek before, during, and after
20 scheduled shifts; before the restaurant was open to customers; after the restaurant was
21 closed to customers; while Plaintiff had few to no customers to serve; before serving her
22 first customer; and after being "cut" from serving customers.
23

24 22. In both policy and practice, Defendant regularly and consistently required
25 Plaintiff to perform the above-listed non-tipped labor unrelated to her tipped occupation
26

1 during the course of Plaintiff's regular workweek before, during, and after scheduled shifts;
2 before the restaurant was open to customers; after the restaurant was closed to customers;
3 while Plaintiff had few to no customers to serve; before serving her first customer; and after
4 being "cut" from serving customers.

5 23. As a result of Defendant's requirement that Plaintiff perform such non-tipped
6 labor related to her tipped occupation, and in excess of twenty percent (20%) of her regular
7 workweek, while earning the reduced tip credit rate, Plaintiff was engaged in a non-tipped
8 occupation, as defined by the "dual jobs" regulation 29 C.F.R. §§ 531.56(e) and (a) and the
9 Department of Labor Field Operations Handbook §30d00(e), for such work performed
10 during that time. Such work performed by Plaintiff included, but was not limited to,
11 spending more than part of her time cleaning and setting tables and making coffee, and
12 more than occasionally washing dishes or glasses. As a result, Defendant was prohibited
13 from taking the tip credit for the hours Plaintiff spent working in a non-tipped occupation.
14 Plaintiff is, therefore, entitled, under 29 C.F.R. § 531.56(a) and 29 U.S.C. § 216(b), to the
15 overall minimum wage for all time spent performing such non-tipped, dual occupation labor.
16 As such, Defendant paid Plaintiff less than the overall minimum wage for the work Plaintiff
17 performed during her regular workweek, in willful violation of the FLSA, 29 U.S.C. § 206(a).

18 24. As a result of Defendant's requirement that Plaintiff perform such non-tipped
19 labor unrelated to her tipped occupation, while earning the reduced tip credit rate, Plaintiff
20 was engaged in a non-tipped occupation, as defined by the "dual jobs" regulation 29 C.F.R.
21 §§ 531.56(e) and (a) and the Department of Labor Field Operations Handbook §30d00(e),
22 for such work performed during that time. Such work performed by Plaintiff included, but
23

1 was not limited to, spending more than part of her time cleaning and setting tables and
2 making coffee, and more than occasionally washing dishes or glasses. As a result, Defendant
3 was prohibited from taking the tip credit for the hours Plaintiff spent working in her non-
4 tipped occupation. Plaintiff is, therefore, entitled, under 29 C.F.R. § 531.56(a), to the overall
5 minimum wage for all time spent performing such non-tipped, dual occupation labor. As
6 such, Defendant paid Plaintiff less than the overall minimum wage for the work Plaintiff
7 performed during her regular workweek, in willful violation of the FLSA, 29 U.S.C. § 206(a).

9 25. As a result of Defendant's willful failure to compensate Plaintiff the applicable
10 minimum wage for such hours worked, Defendant has violated 29 U.S.C. § 206(a).

12 26. Defendant knew that – or acted with reckless disregard as to whether – its
13 failure to pay to Plaintiff the full applicable minimum wage, without applying the tip credit,
14 for time spent performing labor in such a non-tipped occupation, would violate federal and
15 state law, and Defendant was aware of the FLSA minimum wage requirements during
16 Plaintiff's employment. As such, Defendant's conduct constitutes a willful violation of the
17 FLSA.

19 27. Defendant has and continues to willfully violate the FLSA by not paying
20 Plaintiff the full applicable minimum wage for time spent performing non-tipped labor
21 related to her tipped occupation in excess of 20% of her regular workweeks, and non-tipped
22 labor unrelated to her tipped occupation over the course of her regular workweeks.

24 28. In a given workweek, and during each and every workweek for which Plaintiff
25 worked for Defendant as a tipped employee, Defendant required Plaintiff to perform a
26 substantial amount of non-tipped labor related to her tipped occupation in excess of 20% of
27

1 her regular workweek and non-tipped labor unrelated to her tipped occupation over the
2 course of her regular workweek. Defendant paid Plaintiff less than the overall minimum
3 wage for such work that Plaintiff performed for Defendant, such that the average of
4 Plaintiff's hourly wages was less than the applicable minimum wage, in willful violation of 29
5 U.S.C. § 206(a). Defendant required Plaintiff to perform non-tipped labor related to her
6 tipped occupation in excess of 20% of her regular workweeks and non-tipped labor
7 unrelated to her tipped occupation each and every workweek during which she worked for
8 Defendant.

9
10 29. Plaintiff believes and therefore avers that Defendant owes her similar wages
11 for each and every workweek during which she worked for Defendant for the entire
12 duration of her employment. Furthermore, when an employer fails to keep complete and
13 accurate time records, employees may establish the hours worked by their testimony, and the
14 burden of overcoming such testimony shifts to the employer.

15
16 30. Defendant engaged in the regular practice of failing to accurately, if at all,
17 record the time during which Defendant suffered or permitted Plaintiff to work. As such,
18 Defendant's records of Plaintiff's time worked, if in existence, understate the duration of
19 time each workweek that Defendant suffered or permitted Plaintiff to work.

20
21 31. Pursuant to the FLSA, 29 U.S.C. § 203(m), and Ohio wage and hour law,
22 employers may impose a tip credit on their tipped employees' wages of up 50% of the
23 minimum wage, on the condition that, among other requirements, such employees have
24 been informed by the employer of the provisions of 29 U.S.C. § 203(m).

1 32. Defendant failed to inform Plaintiff of the provisions of 29 U.S.C. § 203(m) at
2 any time over the duration of her employment with Defendant. As such, Defendant was not
3 entitled to impose any tip credit upon Plaintiff's wages, and Defendant should have
4 therefore paid the full Ohio minimum wage to Plaintiff for all time Plaintiff worked during
5 the course of her regular 40-hour workweeks.
6

7 33. As such, full minimum wage for such time is owed to Plaintiff for the entire
8 time she was employed by Defendant.

9 34. Plaintiff is a covered employee within the meaning of the Fair Labor
10 Standards Act ("FLSA").
11

12 35. Plaintiff was a non-exempt employee.

13 36. Defendant refused and/or failed to properly disclose to or apprise Plaintiff of
14 her rights under the FLSA.

15 37. Defendant individually and/or through an enterprise or agent, directed and
16 exercised control over Plaintiff's work and wages at all relevant times.
17

18 38. Due to Defendant's illegal wage practices, Plaintiff is entitled to recover from
19 Defendant compensation for unpaid wages, an additional amount equal amount as liquidated
20 damages, interest, and reasonable attorney's fees and costs of this action under 29 U.S.C. §
21 216(b).
22

23 39. Plaintiff has retained The Bendau Law Firm, PLLC to represent her in this
24 litigation and has agreed to pay a reasonable fee for the services rendered in the prosecution
25 of this action on her behalf.
26
27

**COUNT ONE: FAIR LABOR STANDARDS ACT
NON-TIPPED LABOR RELATED TO TIPPED WORK IN EXCESS OF 20%**

1 40. Plaintiff realleges and incorporates by reference all allegations in all preceding
2 paragraphs.

3 41. Defendant intentionally failed and/or refused to comply with the FLSA, 29
4 U.S.C. § 201, *et seq.*, 29 C.F.R. § 531.56(e), and the Department of Labor Field Operations
5 Handbook §30d00(e) by requiring Plaintiff in a given workweek, and during each and every
6 workweek Plaintiff was employed by Defendant, to perform non-tipped labor related to her
7 tipped occupation in excess of twenty percent (20%) of her regular 40-hour workweek, while
8 paying Plaintiff at the tip credit rate.

9 42. Defendant intentionally failed and/or refused to pay Plaintiff the full
10 applicable minimum wage according to the provisions of the FLSA for time she spent
11 performing non-tipped labor related to her tipped occupation in excess of twenty percent
12 (20%) of a given workweek, for each and every workweek that Plaintiff was employed by
13 Defendant, in violation of 29 U.S.C. § 206(a).

14 43. As such, full applicable minimum wage for such time Plaintiff performed non-
15 tipped labor related to her tipped occupation in excess of twenty percent (20%) of her
16 regular workweek is owed to Plaintiff for each and every workweek she was employed by
17 Defendant.

18 44. Defendant knew that – or acted with reckless disregard as to whether – its
19 failure to pay Plaintiff the full applicable minimum wage, without applying the tip credit,
20 for time spent performing labor in such a non-tipped occupation, would violate federal and
21 state law, and Defendant was aware of the FLSA minimum wage requirements during
22

Plaintiff's employment. As such, Defendant's conduct constitutes a willful violation of the FLSA.

3 45. Plaintiff is therefore entitled to compensation for the full minimum wage at an
4 hourly rate, to be proven at trial, plus an additional equal amount as liquidated damages,
5 together with interest, reasonable attorney's fees, and costs.

WHEREFORE, Plaintiff, Jaclyn Davis, individually, respectfully requests that this Court grant relief in Plaintiff's favor, and against Defendant The Samurai Inc. d/b/a Benihana for compensation for unpaid minimum wages, plus an additional equal amount as liquidated damages, prejudgment and post-judgment interest, reasonable attorney fees, costs, and disbursements of this action, and any additional relief this Court deems just and proper.

COUNT TWO: FAIR LABOR STANDARDS ACT
NON-TIPPED LABOR UNRELATED TO TIPPED WORK

5 46. Plaintiff realleges and incorporates by reference all allegations in all preceding
6 paragraphs.

7 47. Defendant intentionally failed and/or refused to comply with the FLSA, 29
8 U.S.C. § 201, *et seq.*, 29 C.F.R. § 531.56(e), and the Department of Labor Field Operations
9 Handbook §30d00(e) by requiring Plaintiff in a given workweek, and during each and every
0 workweek Plaintiff was employed by Defendant, to perform non-tipped labor unrelated to
1 her tipped occupation over the course of her regular 40-hour workweek, while paying
2 Plaintiff at the tip credit rate.
3

48. Defendant intentionally failed and/or refused to pay Plaintiff the full
5 applicable minimum wage according to the provisions of the FLSA for time she spent
6 performing non-tipped labor unrelated to her tipped occupation over the course of a given
7

1 workweek, for each and every workweek that Plaintiff was employed by Defendant, in
2 violation of 29 U.S.C. § 206(a).

3 49. As such, full applicable minimum wage for such time Plaintiff performed non-
4 tipped labor unrelated to her tipped occupation over the course of her regular workweek is
5 owed to Plaintiff for each and every workweek she was employed by Defendant.
6

7 50. Defendant knew that – or acted with reckless disregard as to whether – its
8 failure to pay to Plaintiff the full applicable minimum wage, without applying the tip credit,
9 for time spent performing labor in such a non-tipped occupation, would violate federal and
10 state law, and Defendant was aware of the FLSA minimum wage requirements during
11 Plaintiff's employment. As such, Defendant's conduct constitutes a willful violation of the
12 FLSA.
13

14 51. Plaintiff is therefore entitled to compensation for the full minimum wage at an
15 hourly rate, to be proven at trial, plus an additional equal amount as liquidated damages,
16 together with interest, reasonable attorney's fees, and costs.
17

18 **WHEREFORE**, Plaintiff, Jaclyn Davis, individually, respectfully requests that this
19 Court grant relief in Plaintiff's favor, and against Defendant The Samurai, Inc. d/b/a
20 Benihana for compensation for unpaid minimum wages, plus an additional equal amount as
21 liquidated damages, prejudgment and post-judgment interest, reasonable attorney fees, costs,
22 and disbursements of this action, and any additional relief this Court deems just and proper.
23

24 **COUNT THREE: FAIR LABOR STANDARDS ACT**
25 **FAILURE TO PROVIDE NOTICE OF TIP CREDIT TO PLAINTIFF**

26 52. Plaintiff realleges and incorporates by reference all allegations in all preceding
27 paragraphs.

1 53. Defendant intentionally failed and/or refused to inform Plaintiff of the
2 provisions of the “tip credit” and 29 U.S.C. § 203(m) and its supporting regulations.

3 54. Defendant intentionally failed and/or refused to pay Plaintiff the full
4 minimum wage according to the provisions of the FLSA for each and every workweek that
5 Plaintiff worked for Defendant, for the duration of her employment, in violation of 29
6 U.S.C. § 206(a).

7 55. As such, full applicable minimum wage for such time Plaintiff worked is owed
8 to Plaintiff for the entire time she was employed by Defendant.

9 56. Defendant knew that – or acted with reckless disregard as to whether – their
10 failure to pay Plaintiff the full minimum wage over the course of her employment would
11 violate federal and state law, and Defendant was aware of the FLSA minimum wage
12 requirements during Plaintiff’s employment. As such, Defendant’s conduct constitutes a
13 willful violation of the FLSA.

14 57. Plaintiff is therefore entitled to compensation for the full minimum wage at an
15 hourly rate, to be proven at trial, plus an additional equal amount as liquidated damages,
16 together with interest, reasonable attorney’s fees, and costs.

17 **WHEREFORE**, Plaintiff, Jaclyn Davis, individually, respectfully requests that this
18 Court grant relief in Plaintiff’s favor, and against Defendant The Samurai, Inc. for
19 compensation for unpaid minimum wages, plus an additional equal amount as liquidated
20 damages, prejudgment and post-judgment interest, reasonable attorney fees, costs, and
21 disbursements of this action, and any additional relief this Court deems just and proper.

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

RESPECTFULLY SUBMITTED this 27th Day of October 2015.

THE BENDAU LAW FIRM, PLLC

By: /s/ Clifford P. Bendau, II
Clifford P. Bendau, II (OH No. 0089601)
THE BENDAU LAW FIRM PLLC
6350 East Thomas Road, Suite 330
Scottsdale, Arizona 85251
Telephone AZ: (480) 296-7887
Telephone OH: (216) 395-4226
Facsimile: (480) 429-3679
Email: cliffordbendau@bendaulaw.com

By: /s/ James L. Simon
James L. Simon (OH No. 89483)
THE LAW OFFICE OF ANDREW J.
SIMON
6000 Freedom Square Dr.
Independence, OH 44131
Telephone: (216) 525-8890
Facsimile: (216) 642-5814
Email: jameslsimonlaw@yahoo.com

Attorneys for Plaintiff